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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of
Implementation of Sections 3(n)
and 332 of the Communications Act

Regulatory Treatment of
Mobile Services

GN Docket No. 93-252

COMMENTS OF METRICOM, INC.

Metricom, Inc. ("Metricom"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making ("Notice") in the above-captioned proceeding, which was released on October 8, 1993. As discussed below, Metricom submits that the amendments made to the Communications Act by the Omnibus Budget Reconciliation Act ("OBRA") do not apply to either: (i) unlicensed personal communications services ("PCS"); or, (ii) unlicensed services operating pursuant to Part 15 of the Commission's Rules ("Part 15 Services"), because they do not constitute a "commercial mobile service" as that term is defined and used in amended Sections 3(n) and 332 of the Communications Act of 1934 ("Communications Act"). Therefore, these Comments request that the Commission clarify that unlicensed services are not included within the parameters of this Rule Making. In response to the Commission's inquiry, these comments also argue that Automatic Vehicle Monitoring ("AVM") is available to a substantial portion of the public.

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A. UNLICENSED SERVICES

1. Metricom is a new, expanding, technologically innovative company based in Los Gatos, California. Metricom develops and manufactures low-power radio frequency transmitter and receiver systems which are used to provide Part 15 Services.

2. The term "commercial mobile service" (as defined and used in Title VI, Section 6002(b) of OBRA,^{1/} which amends Sections 3(n) and 332 of the Communications Act) does not encompass unlicensed PCS and Part 15 Services.^{2/} OBRA defines a commercial mobile service as "any mobile service (as defined in Section 3(n)) that is provided for profit and makes interconnected service available" to the public or to certain classes of users.^{3/} Therefore, whether a service is a commercial mobile service will depend, in part, on

^{1/} Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

^{2/} Whether unlicensed services are the "functional equivalent" of commercial mobile services is a non-issue. The issue of functional equivalency arises only in attempting to determine whether a service is a "private mobile service." (See 47 U.S.C. Section 332(d)(3) which provides that a "private mobile service" is either a service which is not a commercial mobile service or a service which is the functional equivalent of a commercial mobile service.) Unlicensed services cannot be "private mobile services" as OBRA defines them because, according to OBRA, the term "private mobile service" means "any mobile service (as defined in section 3(n))." [Emphasis added.] If a service does not meet Section 3(n)'s definition of mobile service, it cannot be a private mobile service. As discussed in paragraphs 3, 4 and 5 hereof, unlicensed services do not meet the 3(n) definition. To sum up, if unlicensed services cannot be mobile services for failure to meet the 3(n) definition, they cannot be private mobile service and the functional equivalency issue does not arise.

^{3/} Emphasis added. OBRA at 395-6.

whether the service is a "mobile service" pursuant to Section 3(n) of the Communications Act.

3. OBRA amends Section 3(n)'s definition of mobile service by clarifying that certain PCS and private land mobile services are to be included within the definition.^{4/} Specifically, "mobile service" is defined to include "any service for which a license is required in a personal communications service"^{5/} [Emphasis added.] Significantly, this language does not refer to "any PCS" or "any licensed or unlicensed PCS." This language demonstrates that Congress intended to include only licensed PCS in the definition of mobile service. Therefore, unlicensed PCS^{6/} are neither mobile services nor commercial mobile services for the purposes of Sections 3(n) and 332 of the Communications Act.

4. The definition of "mobile service" also incorporates the definition of traditional private land mobile service (as previously contained in Section 3(gg) of the Communications Act) which is defined as "a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or

^{4/} See Notice at ¶ 9.

^{5/} OBRA at 396.

^{6/} An example of an unlicensed PCS would include, but not be limited to, high and low speed data links between computing devices, cordless telephones and wireless PBXs. See Second Report and Order, GEN Docket No. 90-314, RM-7140, RM-7175, RM-7618, In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, released October 22, 1993, ¶ 79 ("PCS Report and Order").

multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation." [Emphasis added.] The parenthetical language contained in this definition specifies that the "mobile services" about which Congress is concerned are licensed services.

5. Likewise, Part 15 Services are not mobile services under Section 3(n)'s definition because Part 15 Services are unlicensed and, in many substantive respects, are comparable to unlicensed PCS. Indeed, the Commission adopted an unlicensed approach for both Part 15 Services and unlicensed PCS in order to permit the introduction of new products without the delays and other administrative burdens that normally accompany licensed services. The Commission's objective was to foster the rapid introduction of new wireless technologies and the Commission has been very successful in this regard.¹⁷

6. Significantly, the Commission has recognized that unlicensed PCS and Part 15 Services are generically identical when it stated the following regarding these services:

We continue to recognize the important opportunities that unlicensed PCS offers for creation of new services and technologies. The current Part 15 unlicensed operations have proven successful in bringing forth a wide variety of services and devices We believe that a substantial allocation dedicated for unlicensed PCS will have the potential to foster development of an even greater number and range of new wireless services and devices [than those developed pursuant to Part 15].¹⁸

¹⁷ See, e.g., PCS Report and Order at §§ 79 and 87.

¹⁸ PCS Report and Order at § 87.

This recognition by the Commission requires that unlicensed Part 15 Services be treated in a manner consistent with the Commission's treatment of unlicensed PCS; Part 15 Services are also not "commercial mobile services."

7. In order to avoid both continued confusion and continued expenditure of Commission resources to repeatedly address this question, the Commission should speak to this issue in the Order concluding this proceeding and clarify that unlicensed PCS and Part 15 devices are not included in this proceeding addressing the regulatory treatment of mobile services.

B. AVM SERVICES

8. The Notice, at Footnote 51, states that the Commission is presently considering whether to permit licensees of Automatic Vehicle Monitoring (AVM) systems to provide location services to Part 90 eligibles, individuals, and the Federal government on a for-profit basis.^{2/} The Commission asks how AVM systems should be classified -- as private or common carriers -- given the fact that AVM may be provided to Part 90 eligibles, individuals and the Federal government, as opposed to "such classes of eligible users as to be effectively available to a substantial portion of the public," as specified in OBRA.

^{2/} Part 90 of the Commission's Rules were proposed to be expanded to permit AVM licensees to provide service to more than just Part 90 eligibles. See Notice of Proposed Rule Making, PR Docket 93-61, 8 FCC Rcd 2502 (1993), ¶¶ 7-8.

9. It is insufficient to exempt a particular service from OBRA's grasp just because the Commission uses the words "Part 90 eligibles, individuals and the Federal government," instead of "a substantial portion of the public." The effect of expanding Part 90 eligibility and including the word "individual" in the list of those to whom AVM systems may render service is to make the service effectively available to a substantial portion of the public. Surely, OBRA cannot be read to imply that, before a service comes within its grasp, the Commission must count the number of individuals to whom the service is actually available and, if the Commission determines that the number of people to whom the service is available is a substantial portion of the public, only then will the full force and effect of OBRA apply to the service. Since an AVM operator may make its services available to individuals, market incentives will require that it seek to offer its services to all individuals and to actually serve as many individuals as it can possibly serve. Therefore, market forces will compel an AVM licensee to make its services available to, and seek to serve, not only a substantial portion of the public, but the entire public, which is composed of all individuals.^{10/} In addition, Congress was clear that its definition of "commercial mobile service"

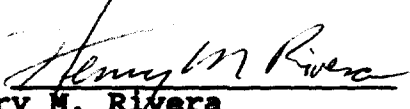
^{10/} Another argument supporting AVM's availability to a "substantial portion of the public" is that if the Commission ultimately determines that "wide area" services should be considered available to a "substantial portion of the public," see ¶ 36 of the Notice, the operational characteristics of AVM are such that AVM will be included among those services considered "wide area" and, therefore, AVM will be deemed to be available to a substantial portion of the public.

encompasses all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public" so that it is irrelevant whether services are offered to the public at large.^{11/}

WHEREFORE, Metricom requests that the Commission clarify that unlicensed Part 15 Services are not "commercial mobile services" and should not be regulated as such; and, that the Commission determine that AVM is available to a substantial portion of the public.

Respectfully submitted,

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Dated: November 8, 1993

^{11/} H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494,496. See, also, US WEST Comments filed in this proceeding at pp. 18-21.